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JOHN JAY,

FIRST CHIEF JUSTICE OF THE UNITED STATES.[1]

The First Chief Justice of the United States will always hold a place apart among the jurists of this country, notwithstanding the fact that the details of his activity during his brief tenure are so meagre, if not fragmentary, that it is impossible to base upon them any just or satisfactory idea of his ability as a judge or his learning as a lawyer. The mere fact that the first president of the United States selected him as the fittest of all his fellows for the position, or rather that Washington offered him the choice of positions in the new government, is in itself proof positive of the worth and character of the man; and the fact that Jay himself selected the Chief Justiceship as most in accord with his tastes and inclination would go far to establish his fitness for the position if other proofs were lacking.

Jay was far from emotional, and men and measures passed with difficulty the searching criticism of a singularly keen and just judgment. He measured himself by the standard he applied to others, and the estimate of his own powers was not a whit the less impersonal than his estimate of friend or foe.

He selected the Chief Justiceship because he knew that

[1] In the preparation of this article Mr. Pellew's admirable life of Jay in the American Statesman Series has been frequently quoted, and often paraphrased. The Correspondence and Public Letters of Jay, edited by Johnston, have been constantly referred to. In a lesser degree Jay's Life by his son has been referred to, and Flanders' account of Jay in the (revised edition) "Lives of the Chief Justices" has been consulted in the matter of Jay's Chief Justiceship.

he was qualified for the position, and contemporaries as well as posterity accept the verdict as founded in every particular. It is well within the mark to say that probably no one would to-day dissent from the stately phrases in which Washington refers to the appointment: "In nominating you for the important station which you now fill, I not only acted in conformity with my best judgment, but I think I did a grateful thing to the good citizens of these United States."[1]

The cast of his mind was judicial and the course of his life off the bench was a daily proof of his fitness for the bench, but the best justification of the appointment is nevertheless the judicial gravity and capacity shown in his conduct of the affairs of State. In this he is in marked contrast with his distinguished successor, who is with one accord acclaimed the great Chief Justice. In Congress as in the Cabinet, Marshall was preeminently a partisan—a politician in the better sense of the word. Few could believe that the Judge lay deeply imbedded in the ardent Federalist; but once Chief Justice, the judicial quality of the man triumphed over the politician, and displayed itself in unsuspected purity and greatness. Had Jay never sat on the bench his fitness for the position would have been as patent to posterity as it was to his contemporaries. Had Marshall remained in active politics it is probable that we would hardly know that we had lost our greatest judge.

The life of John Jay falls into three equal groups of twenty-eight years.[2] In the first period, he fitted himself for public position; in the second, he worthily occupied the highest stations with credit alike to himself and his country, and in the last period he led a quiet but no less dignified life of retirement, consoled by the recollection of a spotless career and preparing himself for the life eternal.

It is the purpose of the present article to consider the career of John Jay in the second period with only such reference to the first and the last as is necessary to understand the preparation for his public career, the career itself, and the character of the man as the resultant of preparation and achievement.

[1] Correspondence and Public Papers, Vol. III, p. 378.

[2] This happy division is Pellew's, not the writer's.

John Jay was born in the City of New York on the 12th day of December, 1745. The ancestry is in one respect important as it accounts in part for the austerity of his life and the fervor of his religious convictions, which approached as near to fanaticism as was consistent with a nature as restrained as it was judicial. His great-grandfather, Pierre Jay, was a Huguenot of La Rochelle, and on the unfortunate revocation of the Edict of Nantes in 1685, the merchant sought refuge in England. Most of his property was confiscated after the manner of the day, but the spirit was unbroken. We would all admit that the act of persecution was unjustifiable, but it was doubly unfortunate to France in that it drove beyond the Kingdom the most devoted and the most skilled of French workmen.

The Elector of Brandenburg was wise enough to offer an asylum and the commercial prosperity of Prussia was due in no small degree to the protestant refugees from France. And it may not be without interest to note that the first German officer to fall in the fateful war of 1870 bore the name of a Huguenot outcast. The same is true in a less degree of Holland, and the influence of the Huguenot in England is clearly traceable. Not to go beyond the domains of law, the most perfect and rounded master of English law, Sir Samuel Romilly, had not a drop of English blood in his veins, and in other walks of life the exile was hardly less useful, if less distinguished.

The grandfather, Augustus Jay, settled in New York in 1686, where he married one Maria Bayard, a descendant of a Protestant professor of theology at Paris, who sought the protection of Holland.

It is barely possible that the leaning to Holland and the admiration of the Dutch in the writings of Jay may have been tinged by an unconscious sentiment as well as by their intrinsic merit. The law of an orderly and regulated liberty in which the individual was protected from despotism on the one hand as well as from license on the other, which led Jay to prefer England to France, may perhaps be explained by ancestry as much as by temperament.

The intermarriage of the father, Peter Jay, with the Van Cortlands associated the young man with the traditions of Holland, and England and Holland suggested

themselves, and not unnaturally, as models for the career of their gifted son.

In another respect, the ancestry of Jay was an advantage in the trying period of the French Revolution when the Federalists were accused of truckling to England. In the midst of the opposition in 1796 to the so-called Jay Treaty with Great Britain, Jay could and did say: "Not being of British descent (of his great grandparents three were French and five Dutch) I cannot be influenced by that tendency towards their national character, nor that partiality for it, which might otherwise be supposed to be not unnatural."

But to return to the subject of the sketch. The youth of Jay offers nothing that is remarkable, except that he seems never to have been young in the ordinary sense of the word, and the balanced way of life, often the result of experience, seems in him to have been innate.

"Johnny"—it seems almost as much a profanation to think of him as "Johnny" as it is to learn that Emerson smoked—"Johnny," said his father, "is of a very grave disposition and takes to learning exceedingly well." This was said of him at seven, and it is therefore not surprising to learn that the youth was prepared for college at the age of fourteen. The college was Columbia, then known as Kings, and thus he was one of the earliest as well as the most distinguished of the alumni.

There is one slight incident that shows that young men of character were then as unwilling as now to peach on their fellows. For a breach of discipline committed in the presence of Jay several students were banished. In this matter Jay took no part, but for refusing like a man of honor to reveal the names of his fellow students, he shared their fate. He was, however, soon allowed to return, and finished his course without other incident.

In his last year as an undergraduate, the young man—"a youth remarkably sedate and well disposed"—determined upon the study of law. On learning the son's choice the father wrote to him: "Your observations on ye study of ye law I believe are very just, and as it's your inclination to be of that profession, I hope you'll closely attend to it, with a firm resolution that no difficulties in

prosecuting that study shall discourage you from applying very close to it, and, if possible, from taking a delight in it.[1]

It is perhaps worthy of note as throwing a light upon the seriousness of purpose, that Jay is reported to have begun his preparation for the bar by a study of a subject which few lawyers deem of importance either to the preparation or completeness of their studies. It appears that he read carefully and thoroughly the *De Jure Belli ac Pacis* of Grotius and thus bottomed himself upon the law of nations which as diplomat and Judge he was called upon to apply and expound.[2] The Book of Grotius bore immediate fruit, and on graduation in 1764 he delivered a much admired dissertation upon the blessings of peace.

Almost immediately upon graduation Jay bound himself an apprentice for five years to Benjamin Kissam, an eminent barrister of the day, and had as companion for two years of the time, one Lindley Murray, of whose subsequent title to fame the Chemist Dalton said: "That of all the contrivances invented by human ingenuity for puzzling the brains of the young, Lindley Murray's grammar was the worst." However that may be, Murray's account of Jay is interesting. "He was remarkable," according to the grammarian, "for strong reasoning powers, comprehensive views, indefatigable application, and uncommon firmness of mind."

In 1768 Jay was admitted to the bar, and a few years later formed a temporary partnership with Robert R. Livingston, later Secretary of State, Chancellor of New York, and negotiator of the famous treaty which added the vast territory of Louisiana to the United States.

A young lawyer's practice is as a rule only interesting to himself, and Jay's is no exception. The nature of his cases appears from the following extract from a letter: "One is about a horse-race, in which I suppose there is some cheat; another is about an eloped wife; another of them also appertains unto horse-flesh * * * There is also one Writ of Inquiry."[3] The daily routine was varied

[1] Correspondence and Public Papers, Vol. I, p. 1.

[2] The Charge to the Grand Jury at Richmond, May 22, 1793, and the trials of Gideon Henfield and Ravara are noted later.

[3] Letter of Kissam to Jay, Nov. 6, 1769, Correspondence and Public Papers, Vol. I, p. 9.

by the formation of "The Moot," a club that met monthly to discuss questions of law. The members of this club are well known to fame, and include the following names: Egbert Benson, Robert R. Livingston, James Duane, Gouverneur Morris, and Peter Van Schaack, the loyalist. Frequent visitors older than the members included William Smith, later Chief Justice of Canada, Samuel Jones the Chief Justice, and John Morrin Scott, famous as patriot and general in the Revolution.

Jay was already in 1771 a successful lawyer, and the first twenty-eight years of his life closed happily with his marriage with Sarah Livingston, youngest daughter of William Livingston, the famous Revolutionary Governor of New Jersey. The end of the year closed his private career at the bar, and the stirring days of the Revolution, it may be said, thrust him into public life rather than offered him an opportunity to display the talents and ability which he had cultivated assiduously in private.

The Revolution found Jay a quiet practitioner, alike by temperament, training and fortune conservative; it left him a leader in the national life of the young republic, trusted and honored at home, and known as an able diplomat in the courts of Europe.

In the first two years of the movement from 1774 to 1776, there were in New York, as in the other Colonies, two parties; one radical and revolutionary, of which the Adamses in Massachusetts may be taken as the type; the other no less patriotic, but more bent on securing the recognition of their rights and a redress of admitted grievances by concessions from within the Empire rather than from the overthrow of British authority. Of this type Jay in New York and Dickinson in Pennsylvania were fairly representative.

The passage of the Boston Port Bill in 1774 was the signal for open resistance. When the news of the measure reached New York the smouldering opposition leaped into flame; a meeting assembled to consider the course to be pursued, and a sub-committee, with Jay as a member, was appointed to draft a reply to a message from Boston. The letter was composed by Jay and urged that "a Congress of deputies from the colonies in general is of the utmost

moment," to form "some unanimous resolutions * * * not only respecting your [Boston's] deplorable circumstances, but for the security of our common rights."[1] The letter suggested that the question of a non-importation agreement should be left to the Congress. The idea of united resistance was in the air and although a recommendation of substantially the same character had been made earlier, or about the same time, by the House of Burgesses of Virginia, and by meetings in Providence and Philadelphia, no news of these proceedings had reached New York. Common necessity had devised a common plan, and co-operation of all, for the benefit of all, irrespective of locality, occurred to the thoughtful simultaneously. The New York idea of a Congress appealed to the Colonies, and delegates were chosen in one Colony after the other for the purpose of a united and universal protest. Jay and his colleagues were unanimously chosen delegates to the Congress, known and justly famous as the First Continental Congress, which met in Philadelphia on the fifth day of September, 1774.

Of this remarkable assembly Jay, although the youngest, was by no means the least conspicuous member. "Mr. Jay is a young man of the law," to quote an entry in John Adams' diary, "a hard student and a good speaker."

The Colonies were not ready for independence; a redress of grievances was the desire of all and the utmost that a loyal consideration could suggest. Revolution was the desire of the Radicals and posterity has justified them. But the effort of the conservatives to secure by petition and remonstrance, futile as regards Great Britain, was of supreme importance in convincing the backward elements in the Colonies that nothing was to be hoped from negotiation.

"The measure of arbitrary power," said Jay, "is not yet full, and I think it must run over before we undertake to frame a new constitution." Congress therefore decided, and wisely, to appeal to the People of Great Britain, and the Address, drawn up by Jay,[2] was declared by Jefferson,

[1] Correspondence and Public Papers, Vol. I, pp. 13–15.

[2] Correspondence and Public Papers, Vol. I, pp. 17–32.

himself an authority on such matters, to be "a production certainly of the finest pen in America."

From this first Congress, which sat for a period of six weeks and in which all the Colonies but Georgia were represented, the Union may not improperly be dated. There was as yet no intention to overthrow the home government, but the agency had been set in motion which would inevitably lead to it, unless the grievances were redressed. George III. and his besotted ministers never thought of concession, except as a temporary expedient or as an indirect means of accomplishing their ultimate purpose, namely, the closer, indeed the complete dependence rather than the interdependence of Mother Country and Colonies.

The struggle was greater than most people knew, for had the sentiment of Liberty been crushed or stifled in the Colonies, it would have languished and suffered, if it were not actually destroyed, in Great Britain.

The cry of "George be King" always rang in the ears of the royal madman, and the overthrow of the Cabinet system and the loss of constitutional liberty were in the balance. It is a trite saying that the battle of English Constitutionalism was won in America, but it is better than trite, it is true. It is no small tribute to the sagacity of Jay that he clearly gauged the importance of the conflict.

"Be not surprised, therefore, that we, who are descended from the same common ancestors; that we, whose forefathers participated in all the rights, the liberties, and the constitution you so justly boast of, and who have carefully conveyed the same fair inheritance to us, guaranteed by the plighted faith of government, and the most solemn compacts with British sovereigns, should refuse to surrender them to men who found their claims on no principles of reason, and who prosecute them with a design that, by having *our* lives and property in their power, they may with the greater facility enslave *you*."[1]

The stirrers up of sedition are now the patriots of Great Britain as well as of the country whose very existence is the work of their hands.

The Congress adjourned to meet in the ensuing year, and in this assembly which met on May 10th, 1775, every Colony was represented. But in the interval of eight months

[1] Correspondence and Public Papers of John Jay, 1763–1825, Vol. I, p. 18.

between the two, the Colonist and the King's troops had met in battle. Lexington and Concord had been fought and the British Army was already besieged in Boston. The duty of the Congress was two fold: to prepare for war, and to endeavor to secure by peaceful means the safeguard of colonial liberty. Firm and decided, the Congress was loyal, and Jay persuaded Congress to present a petition to the King. This was written by Dickinson, and addresses were likewise sent to Canada, Jamaica and Ireland. The undoubted purpose was to create sympathy, and to justify their attitude.

But the various addresses were needed nearer home; each petition convinced the conservative Colonists and members of Congress of the justness of the cause, and converted them to a bolder course while they yet spoke softly.[1]

The utter failure of the petition to the King, as well as the scorn and contempt with which it was treated, marked a step in the attitude of Congress and its conservative members. Jay dates the desire for revolution from it. "Before this time," he says, "I never did hear any American of any class, or of any description, express a wish for the indepence of the colonies."

From this moment Jay, while always conservative, became a believer in more progressive measures, and by voice and vote henceforward he consistently supported a vigorous policy. He was rapidly becoming the leader, and had not the affairs of New York summoned him home, it is not unlikely that we might cherish him both as writer and as signer of the Declaration of Independence. On the 10th day of May, 1776, Congress passed a resolution recommending the Colonies "to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general."

When Jay entered the New York Provincial Congress to which he was elected in April, 1776, he entered upon an

[1] Such is the testimony of John Adams: "I was in great error, no doubt, and am ashamed to confess it, for these things were necessary to give popularity to the cause, both at home and abroad." John Adams' Works, Vol. X, p. 80.

entirely new career. He was conservative by nature, moderate in temperament, but henceforth he did not follow the radicals; he led the Revolution in his State. The years 1776 to 1779 were spent in New York and Mr. Pellew rightly heads his chapters dealing with the period, Revolutionary Leader; Constructive Statesman; for he appeared to advantage in both rôles. Of Jay as a Revolutionary leader there is no great need to speak: suffice it to say that he was as active in determining the policy of the State as he was in devising measures to protect it from the enemy without and within. The task was difficult in the extreme, for Revolutionary sentiment barely existed outside of the City of New York, and even that city yielded to British occupation without outbursts of patriotic feeling.

At this time the fate of the young nation seemed to hang on New York. It was a wedge between New England on the East. There was no west beyond it, and it shut off New Jersey, Pennsylvania and the South from New England, the veritable hot-bed of secession. Then, too, it commanded the road to and from Canada. Its possession seemed pivotal, but notwithstanding every exertion of Washington and his little army, the Delaware was crossed and the end of 1776 saw the British securely entrenched in Manhattan. In the interior the Revolutionists were active in intimidating, crushing out, or expelling the loyalists. As a member of the Secret Committee, Jay was as effective as he was impartial, and personal friends, such as Van Schaack, found him as immovable as did the enemy. To quote his own words: "In the course of the present troubles, I have adhered to certain principles, and faithfully obeyed their dictates without regarding the consequences of my conduct to my friends, my family, or myself." To sum up the result of his activity without going into details, Jay's energy saved the State. The next problem was to govern the State that the energy of himself and his friends had saved.

Within a week of the Declaration of Independence the Provincial Congress of New York met at White Plains, and on the first day of its session, July 9, 1776, Jay drafted and reported the following resolution which was adopted unanimously:

"That the reasons assigned by the Continental Congress for declaring the United Colonies free and independent States are cogent and conclusive; and that while we lament the cruel necessity which has rendered that measure unavoidable, we approve the same, and will, at the risk of our lives and fortunes, join with the other colonies in supporting it."

If the United States were free and independent, it followed that the State of New York was independent of Great Britain, and it likewise followed that the State should have an independent government. To frame this government and to put it into force and effect was the work of 1777. It has been more than intimated that Jay was conservative. It was natural therefore that he should not manufacture a constitution out of whole cloth. He would undoubtedly have given his assent to Sir James Mackintosh's happy maxim: "Constitutions are not made: they grow." In the case of our country at large, the federal constitution grew out of the British constitutional practice. In the case of New York, the first State constitution grew out of the provincial government, with such modifications as experience and expediency suggested. The basis of State as well as national constitution was simply provincial or local custom unified and extended upon a larger scale. This idea is admirably expressed in the following quotation:

"The bicameral legislature, the power of the legislative houses to be the sole judges of their own memberships, the method of choosing the presiding officer of the more popular branch, the parliamentary common law, the veto on legislation, the bill of rights, the judicature, the jurisprudence, and the franchises, were all Provincial institutions, continued after the Revolution by virtue of the Constitution, and because they were associated with all that was wisest and best in the previous history of New York. The Revolution was not a war against these things; it was a war for these things—the common property of the Anglican race."[1]

"Those who own the country ought to govern it," said Mr. Jay, and a property qualification passed from the Provincial into the State constitution. Checked by the Council of Appointment and the Council of Revision possessing the power of veto, the Governor was little more than a figurehead. But colonial experience was not apt to confer

[1] R. L. Fowler, Constitution of the Supreme Court of New York, Albany Law Journal, Dec. 18, 1880, p. 488. See also Pellew's Life of John Jay.

extensive power on the Governor. The experience of independent and local self-government has shown the unwisdom of checking the Governor, and everywhere in the country the restrictions of Revolutionary days have been removed.

The reorganization of the law courts will show not only Jay's conservatism, but his belief in the necessity and adequacy of the common law. The Supreme Court was continued, as was also the trial by jury, "in all cases in which it hath heretofore been used in the Colony of New York."

In the following passage the fundamental character of the common law is emphasized: "The Legislature shall at no time hereafter institute any new court or courts, but such as shall proceed according to the courts of the common law." The one new court created was the Court of Errors and Impeachment, in which senators and designated justices of the Supreme Court sat.

The origin of this court is evident. The House of Lords exercised appellate jurisdiction, and still does. It has also sat occasionally as a court of impeachment. But the new court was a decided improvement on the model, in that many of the senators were lawyers, and the judges, as individuals and as a body, had power to advise, though not to vote, upon appeals from their judgments. The lords were rarely lawyers, and it was often necessary to submit a question to the judges of England for their consideration and report.

The New York modification was an improvement. The whole system, however, has passed away with the Revolutionary age, and the lawyer of to-day, as he comes upon it in the reports, looks upon it as a curiosity, with little or no thought of its origin. It is important, however, as showing how thoroughly English was the bent of Jay's mind, for the constitution in its entirety was in Jay's handwriting, and Jay was largely responsible for the amendments proposed and adopted in convention.

The constitution as framed and amended was not submitted to the people, but as adopted and published on April 22, 1777, it remained in force with minor changes until 1846. The constitution was necessarily hasty, but the work was the work of Jay, and it met instant praise in New York, New England, and in the country generally.

It was "generally regarded as the most excellent of all the American constitutions," and it is claimed to have been essentially the model of the national constitution of 1787. Were this so it would be great praise indeed, but the federal constitution is rather the experience of all Colonies and the wisdom of one assembly than a conscious imitation of any single instrument.

Under the new government Robert R. Livingston was appointed Chancellor and Jay Chief Justice. General Clinton was appointed Governor, and so remained until he was beaten at the polls by John Jay many years later.

It is often stated that the polity and political development of New York would have been vastly different had Jay been the first Governor, and the speculation is interesting, if idle. The fact is, Jay was urged to become a candidate for the governorship, and he might or might not have been elected. But the fact is patent that he preferred the chief justiceship at the time of Clinton's selection.

"That the office of the first magistrate of this State will be more respectable as well as more lucrative, and consequently more desirable than the place I now fill, is very apparent. But * * * my object in the course of the present great contest neither has been, nor will be, either rank or money. I am persuaded that I can be more useful to the State in the office I now hold than in the one alluded to, and therefore think it my duty to continue in it."

Beyond Jay's desire for the bench and the fact that he actually was Chief Justice little or nothing can be said. The British Courts of Justice sat in New York in the loyalist neighborhood; courts were held and charges delivered by Jay as Chief Justice in the interior of the State, but it is a fact that the court never once sat in banc during the Revolution. It is also a fact that no reports were published for the first twenty-two years of the Court's existence, so that it is impossible to test from the reported judgments the quality of Jay's mind. His conduct as a statesman is here as elsewhere the best, and indeed in this instance the only evidence of his fitness for judicial position.

Now, as at a later period, his career as Judge was cut short by a political or diplomatic mission. New York, as is well known, claimed Vermont, (then technically known as the

New Hampshire Grants) and it is equally well known that Vermont objected to the claim and insisted successfully in belonging to itself. It is also common knowledge that the crisis was reached at the time of General Burgoyne's expedition.

The New York Legislature deemed it necessary to return Jay to Congress with the special mission of having Congress settle the territorial controversy. He did not resign from the bench at once, but did so on August 10, 1779.

The reception to Jay was highly flattering to him and his State alike, for he had hardly taken his seat when he was elected President of Congress to succeed Henry Laurens.

In the matter of Vermont, Jay showed his cautious moderation. He advised New York and New Hampshire to empower Congress to draw the line between the States in question as well as to settle the controversy with Vermont. By subsequent resolution of Congress the question of the disputed boundary was referred to Commissioners appointed by these States. While this action was in accordance with the spirit of Article IX of the Articles of Confederation, it was eminently characteristic of the man. As statesman and judge he was anxious to have the facts ascertained before pronouncing judgment. This action necessarily recognized the statehood of Vermont, for which course the following letter to Governor Clinton is a sufficient justification if any could be needed:

> "In my opinion it is much better for New York to gain a permanent peace with her neighbors by submitting to these inconveniences, than, by an impolitic adherence to strict rights, and a rigid observance of the dictates of dignity and pride, remain exposed to perpetual dissensions and encroachment."

It is unnecessary to descant upon the honorableness of the Presidency of Congress, which was, during the Revolution and before the establishment of the present system of government, the position of greatest dignity within the gift of Congress, unless, indeed, the Chief Command of the Army be excepted. As President, Jay's history was the country's history and is to be found in the annals of Con-

gress. He had constantly been in the public service since 1774, most of the time away from his home, which was a great hardship to one of his domestic temperament. He therefore contemplated retirement, not the retirement of the politician, but the self-effacement of John Jay. On resigning the Chief Justiceship on August 10, 1779, he said: "I shall return to private life, with a determination not to shrink from the duties of a citizen. During the continuance of the present contest I considered the public as entitled to my time and my services." As a matter of fact he was not able to retire before 1802, but as Mr. Pellew remarks, the sincerity of his decision is shown by the last twenty-eight years of his life.

Before this could be done, Congress appointed him Minister to Spain, and in the hope of being of service to his country he resigned the Presidency of Congress on October 1, 1779. On the twentieth of the month he and his household were on the way to Spain. Here his mission was fruitless from the beginning. He was unable to obtain official recognition: he was likewise unable to negotiate a loan for more than $150,000; when Spain went to war it was to acquire Gibraltar and Jamaica, not to help the Colonies in America, and the proposed terms of an alliance, the acquisition of Florida and the sacrifice of Mississippi, were out of the question. So two years and more, the dreariest in Jay's life, passed and nothing was or could be accomplished. The possibility of peace with Great Britain and the request of Franklin, who admired Jay as much as he pitied his position in Spain, that the latter be transferred to Paris, effected his release. Overjoyed at his liberation from a position of humiliation and impotency, Jay hastened to Paris where he arrived in June, 1782.

If the mission to Spain was fruitless, the months spent in Paris were not only agreeable, but were of the greatest service to America and the American cause.

The war had long since established the practical independence of the Colonies, and the only possible excuse for its continuance was to force the recognition of this fact upon the Ministry of George III. The Stillwater campaign of 1777, resulting as it did in the capitulation of

Burgoyne and his army, rudely broke in upon the dream of Northern conquest. The surrender of a British Army at Yorktown in 1781 stamped the southern plan of campaign as no less impossible. New York and its immediate neighborhood, occupied since 1776, were at once the strength and weakness of the British authority in the Colonies, reduced to a shadow by the crazy policy of a crazy king.

France recognized the independence of the Colonies by receiving Dr. Franklin as Minister, and by negotiating two treaties on February 6, 1778, the one for offensive and defensive alliance and the other for amity and commerce. It gradually dawned upon Europe that British power was doomed, and little by little Spain and Holland found themselves at war with Great Britain—and each hoped for a share of the spoils.

In such circumstances, thought of subjugating the Colonies was madness, and it was almost as foolish to continue the war for the shadow, when the substance was already won. The difficulty in the case was that the Colonies had bound themselves not to negotiate separately; that the treaty of France with Great Britain should be negotiated simultaneously with their own. France was not ready to quit and France, bound by the secret treaty of Aranjuez, was dependent on the pleasure of Spain.

It is very frequent to lay treachery to the door of France: it is much better to say that France was not wholly disinterested. The loss of Canada had not been avenged; the independence of the Colonies would reduce Great Britain and would thus act as a balm. But in pulling down an hereditary enemy it was no part of her plan to raise up another rival. An independent neighbor of moderate power and extent was equally pleasing and necessary to France should she in the end hold Louisiana, and Spain did not want a rival to the North of the Floridas which the present war was to restore to her possession.

It is true that the French people were carried away by enthusiasm for the Colonial cause, and that Franklin in France and Lafayette in America bound the two countries by a sentimental tie. But the Court and Cabinet, while

taking advantage of the enthusiasm and the opportunities of the war, had other thoughts and other plans.

To quote de Vergennes: "My Country's good is dear to me. I am no less devoted to Spain; to contribute to the one and the other, that is all my ambition."

Then, too, Dr. Franklin has often been criticized as too yielding to the French Court, and it is at times bluntly stated that he was hoodwinked by the subtle de Vergennes. This seems again to be a misunderstanding of the real situation. Franklin knew that French arms and ammunition decided the cause in America and his instructions on the point of co-operation were direct and binding. He was as desirous as any one to secure the independence, not of a part, but of the whole of the country, so desirous, indeed, that he seriously proposed that Canada should pass to the Colonies; but he was not unwilling that France should draw her chestnut, whatever it might be, out of the fire. He therefore lent his benevolent presence and a not unwilling ear to de Vergennes and his associates in the Ministry. That Franklin did not misunderstand the situation is evident in his statement that with the concession of independence to America "the treaty she (America) had made with France for gaining it ended."

With Jay the situation was different. He was not predisposed in favor of France, although he had no feeling of hostility, for in his well-regulated mind he separated the mistake of a government, or form of government, from the people of the country.

He was likewise freer than Franklin, for the great doctor had been in France for the past six years as the accredited Minister to the Court of France, and his present was necessarily bound up with his past. It would have been a serious wrench to break with the French court, but when convinced that France was playing a part, delaying or prolonging negotiations for purposes alien to the American cause, Dr. Franklin assumed as fully as the younger man the responsibility for breaking the solemn instructions of his Government that peace be concluded in conjunction with and under the advice of France.

Jay's mind was the mind of the trained lawyer and he negotiated solely in the interest of his client without

troubling himself unduly about the interest of other parties, such as Spain or indeed France, if that should prove necessary.

It would serve no useful purpose to recount in detail the phases of the negotiation that so happily resulted in the treaty of September 3, 1783.

Two or three points are, however, important now as they were then. Jay was unwilling to treat for independence, that is, to make independence the result of a gift or a grant on the part of Great Britain. He contended, and rightly, that independence was a fact, and as such its recognition was an essential preliminary. It was as unbecoming to the dignity and self-respect of America to supplicate as Colonies, as it would be humiliating to George III to treat with rebels. Then with independence recognized in advance, it would not be necessary to negotiate or purchase it at the expense of fisheries, boundaries, or other terms. And, finally, the precedent recognition of independence would make America free to treat separately if France and Spain should prove a stumbling-block in the negotiation.

Dr. Franklin was not much impressed with Jay's idea on the point of independence, and was willing to take it at any time and in any way. He called it a lawyer's notion. "Mr. Jay was a lawyer, and might possibly think of things that did not occur to those who were not lawyers." True, and that is a reason why lawyers should settle difficult questions involving municipal and international law, rather than entrusting them to the layman. But though Franklin did not attach much importance to the matter, Jay prevailed and the British negotiators were properly commissioned to treat with the *United States*, not with rebellious Colonies.

The instructions to the negotiators have been referred to, and it is well to quote the clause of June 8, 1781:

> "You are to make the most candid and confidential communications upon all subjects to the ministers of our generous ally, the King of France; to undertake nothing in the negotiations for peace or truce without their knowledge or concurrence; and ultimately to govern yourself by their advice and opinion."

It has been intimated that Franklin felt bound by these instructions and expressed an unwillingness to break them, at least not upon mere suspicion.

Not so Jay, who became convinced of double dealing on the part of France early in the game—for game it was. He felt that de Vergennes had sent a confidential messenger, Rayneval, to London to protest against American interests,[1] and he accordingly dispatched, without consulting Franklin, the economist Vaughan, who was representing Britain in a minor way. From this moment America conducted the negotiations separately, in accordance with American interests. To quote from Oswald, Lord Shelburne's negotiator:

"Upon my saying how hard it was that France should pretend to saddle us with all their private engagements with Spain, he (Jay) replied: 'We will allow no such thing. For we shall say to France: The agreement we made with you we shall faithfully perform; but if you have entered into any separate measures with other people not included in that agreement, and will load the negotiation with their demands, we shall give ourselves no concern about them.'"

When John Adams arrived in Paris in October, 1782, at Jay's earnest call, and was informed of the various steps of the negotiation, he fully adopted Jay's view of the situation. A meeting of the triumvirate in Dr. Franklin's quarters at Passy on October 29, 1782, is thus graphically described by Mr. Pellew in his delightfully charming life of Jay:

"I told him, without reserve," wrote Adams, "my opinion of this court, and of the principle, wisdom, and firmness with which Mr. Jay had conducted the negotiation in his sickness and my absence, and that I was determined to support Mr. Jay to the utmost of my power in the pursuit of the same system. The Doctor heard me patiently, but said nothing. At the first conference we had afterwards with Mr. Oswald, in considering one point and another, Dr. Franklin turned to Mr. Jay and said, 'I am of your opinion, and will go on with these gentlemen in the business without consulting this court.'" This may have been at the first regular meeting of the commissioners, on October 30, to examine books and papers. It was doubtless on some earlier and more private occasion that the characteristic incident occurred, related by Trescot, and quoted by Parton: "'Would you break your instructions?' Franklin asked him one day. 'Yes,' replied Jay, taking his pipe from his mouth, 'as I break this pipe;' and so saying Jay threw the fragments into the fire." The significance of this public acknowledgment by Franklin must not be overlooked, for thereby he became fully entitled to the credit, or discredit, of breaking the instruction to act constantly by the advice of France, which credit, or discredit, is usually reserved only for Jay and Adams.

[1] Fitzmaurice, Life of Landsdowne, Vol. III, 263.

The details of the negotiation belong properly to diplomatic history rather than to a slight sketch of Jay. The important point for the purpose of this article is that Jay's training as a lawyer, as well as the judicial attitude of his mind, made him place the negotiations on the proper basis; that when they were so placed and regarded, the details fitted properly, almost naturally, into the scheme: the Mississippi as western boundary, the partition of the fisheries and a mede of justice to the unfortunate Tories.

From the above account it is at once obvious that the brunt of the negotiation was borne by Jay, but that it is unnecessary to blame Franklin. He may have been a trifle too yielding to France at the beginning of the negotiations; but he accepted Jay's proposals and acted in the greatest good faith and in strict accord with Jay and Adams the moment his judgment was convinced. It must not be forgotten that Franklin's very presence was a pillar of strength, for Great Britain knew and admired him, while France loved him. As an intermediator, as a compromiser, in a word, as a diplomat, his services were invaluable.

Contemporary opinion assigned the chief credit to Jay and posterity can discover no reason to question the justice of the award.[1]

Of the many tributes, two may be selected: "The New England people," wrote Hamilton, "talk of making you an annual fish offering as an acknowledgment of your exertions for the participation of the fisheries." And testy John Adams was no less cordial or outspoken. "The principal merit of the negotiations was Jay's." Again: "A man and his office were never better united than Mr. Jay and the Commission for peace. Had he been detained in Madrid, as I was in Holland, and all left to Franklin as was wished, all would have been lost." And finally: "Our worthy friend, Mr. Jay, returns to his country like a bee to its hive, with both legs loaded with merit and honor."

As Jay's desire was, however, not to return to a hive, but to private life and the practice of the law, he therefore refused the missions to London and France; but on landing

[1] See Pellew's Life of Jay, pp. 199–200, for various commendatory remarks.

in New York on July 24, 1784, he found that Congress had two months previously appointed him Secretary for Foreign Affairs in succession to his friend, Chancellor Livingston. After much doubt he accepted and Secretary he remained until his appointment to the Federal Bench. His reply when urged to run for Governor of New York has not lost its point by the lapse of a century and more. "A servant should not leave a good old master for the sake of a little more pay or a prettier livery."

Jay at once set himself about the duties of his new office and reorganized it and its methods upon a business plan. Notwithstanding the importance and dignity of the office which became under Jay's management the most important in the government, he was as inadequately provided with quarters as with assistants.

> "As late as 1788 there were * * * besides the secretary and his assistants, only two clerks, or just enough, as may be inferred from a report of this date, for one of them to be in the office while the other went to luncheon. The quarters of the office, the reports tells us, consisted of only two rooms, one of them being used as a parlor, and the other for the workshop."

His tenure of office was far from remarkable, for the simple reason that Europe looked somewhat askance at the young republic, and for the further reason that the young republic was already in the throes of dissolution.[1]

It is not without reason that the late John Fisk called this the critical period of American history. The simple fact is that the States were held together from pressure from without, and that when the danger was removed by the establishment of peace, there was no sufficient natural bond as yet to distract their attention from purely local matters. Then, too, the character of Congress had sorely deteriorated, and had not unjustly lost its hold on the people. "Jay, what a set of d——d scoundrels we had in that second Congress" Gouverneur Morris is once reported to have said in a friendly conversation many years later. "Yes", said Jay, "that we had."[2]

[1] The student of our foreign affairs will find the State Papers for this period in Jared Sparks' Diplomatic Correspondence, 1783–1789, 3 vols. (1837).

[2] Pellew's Life of Jay, p. 140.

If such a judgment could be passed on the second Continental Congress, the pious mind is shocked to think what Morris might have said of its successors, and what Jay's love of truth if not of profanity would have forced him to admit. If then, added to the lack of confidence, the fact that Congress could indeed recommend legislation to the States which they might or might not enact, and the further fact that Congress had not power to enforce its own legitimate enactments, it is easy to see that matters were at a standstill. The wheel of State stopped.

To others than Jay belongs the credit of the Constitutional Convention, of which he was not a member, being defeated by the Anti-Federalists. Of the need of a total reorganization on national lines he was a convinced believer, and the Constitution as adopted rested on the fundamental distribution of power outlined in the following paragraph:

"To vest legislative, judicial, and executive powers in one and the same body of men, and that, too, in a body daily changing its members, can never be wise. In my opinion those three great departments of sovereignty should be forever separated, and so distributed as to serve as checks on each other. This principle became the corner-stone of the Federal Constitution. Government by committees was another chief cause of executive procrastination and inconsistency."[1]

Of the work of the Convention he was a defender with voice and pen. An anonymous Address to the People of the State of New York[2] is said to have had "a most astonishing influence in converting Anti-Federalists to a knowledge and belief that the new Constitution was their only salvation."[3]

In the New York Convention he ably seconded the efforts of Hamilton although the latter is rightly credited with the success of the convention. And in the composition of The Federalist he had a small though not unimportant part. He was at one with Hamilton and Madison in its influence and although he contributed but five papers, the second, third, fourth, fifth and sixty-third of them,

[1] Letter to Thomas Jefferson, Aug. 18, 1786, in Correspondence and Public Papers, Vol. III, p. 210.

[2] Correspondence and Public Papers of John Jay, Vol. III, pp. 294–319.

[3] Pellew's Life of John Jay, p. 229.

that was due not to any lack of interest, but solely to the fact of an injury received at the hands of the so-called Doctors' Mob, while helping to restore order.[1]

The papers, worthy of their immortal associates, deal with the value of the union; the advantages and necessity of union in relation to foreign powers; relations with foreign powers; project of separate confederacies, in relation to foreign powers, and the treaty-making power of the Senate.[2]

No analysis of these papers is attempted, because Jay's style of writing is so compressed that the original would take little more space than a satisfactory paraphrase.

With the success of the Federalist, the ratification of the Constitution and the establishment of the government according to the terms of that instrument, Jay necessarily ceased to be Secretary for Foreign Affairs. He was, however, offered his choice of offices by President Washington and as previously stated, Jay choose the judiciary. The following letters so admirably state the offer and acceptance that they are quoted in full.[3]

"It is with singular pleasure that I address you as Chief Justice of the Supreme Court of the United States, for which office your commission is enclosed.

In nominating you for the important Station, which you now fill, I not only acted in conformity to my best judgment but I trust I did a grateful thing to the good citizens of these United States; and I have a full confidence that the love which you bear to our country, and a desire to promote the general happiness, will not suffer you to hesitate a moment to bring into action the talents, knowledge, and integrity which are so necessary to be exercised at the head of that department which must be considered as the keystone of our political fabric."

To this letter Jay replied as follows:

"When distinguished discernment and patriotism unite in selecting men for stations of trust and dignity, they derive honour not only from their offices, but from the hand which confers them.

With a mind and a heart impressed with these reflections, and their correspondent sensations, I assure you that the sentiments expressed in your letter of yesterday and implied by the commission it enclosed, will never cease to excite my best endeavours to fulfil the duties imposed by the

[1] For details, see Pellew's Life of Jay, pp. 227–228.

[2] It is perhaps not presumptuous to suggest that the edition of The Federalist, edited by the late Paul Leicester Ford, is the most serviceable for students.

[3] Correspondence and Public Papers, Vol. III, pp. 378–379.

latter, and as far as may be in my power, to realize the expectations which your nominations, especially to important places, must naturally create."

With most men the Chief Justiceship would be the culmination of a career; with Jay it was merely an incident.

It is certain that the trend of his mind was judicial, and although he had been busy with matters political and diplomatic, it is probable that they strengthened rather than weakened his powers of legal reasoning. He never was a partisan in the one-sided sense of the word, and he never decided any matter without a careful examination of the conflicting aspects in which it presented itself. He was in this sense a judge all his life. The opportunity was, however, never his to make much law from the bench. Chief Justice of an empty court, he left it before cases of great importance arose, and there are very few opinions by which the range and breadth of his mind, the extent and depth of his legal learning, can be judged.

A much admired charge to the grand jury, delivered on the 4th of April, 1790, attests the gravity with which he approached the subject and his conception of the form of liberty consistent with law:

"It cannot be too strongly impressed on the minds of us all how greatly our individual prosperity depends on our national prosperity, and how greatly our national prosperity depends on a well organized vigorous government, ruling by wise and equal laws, faithfully executed; nor is such a government unfriendly to liberty—to that liberty which is really inestimable; on the contrary, nothing but a strong government of laws irresistibly bearing down arbitrary power and licentiousness can defend it against those two formidable enemies. Let it be remembered that civil liberty consists not in a right to every man to do just what he pleases, but it consists in an equal right to all the citizens to have, enjoy, and to do, in peace, security and without molestation, whatever the equal and constitutional laws of the country admit to be consistent with the public good. It is the duty and the interest, therefore, of all good citizens, in their several stations, to support the laws and the government which thus protect their rights and liberties."

There is also a charge of the Chief Justice in the case of Gideon Henfield,[1] in which he assigned to the Presidential

[1]Wharton's State Trials, pp. 49 *et seq.* This is not quite accurate, for the Chief Justice delivered his charge anterior to the trial in question; but Jay's charge is the basis of the prosecution of the charge of the presiding Judge Wilson.

Proclamation of neutrality the force of law independently of any act of Congress "defining and punishing offences against the law of nations." Jay was indisputably right in his statement that the law of nations is part of the common law of England and of the United States and his doctrine of neutral duty by the law of nations was also correct; but it is definitely settled, contrary to the contention of the Chief Justice, that there is no federal common law in criminal cases, for the legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence.[1]

In the case of Georgia *v.* Brailsford,[2] the judgment was clearly right, but the statement of the Chief Justice that the jury was judge of the law as well as the facts was clearly wrong.[3]

The law of the case was of great importance. One Brailsford was a British subject residing in Great Britain and a bond was executed to him by Kelsall and Spalding, citizens of Georgia. The State claimed the bond by virtue of its confiscation act, which sequestered all debts, dues, and demands owing to residents of Great Britain. On friendly suit by Georgia, Jay held, and rightly, that the conclusion of peace revived Brailsford's right to sue and that the pro-

[1] United States *v.* Hudson (1812) 7 Cranch 32. In the case of United States *v.* Ravara (1793) 2 Dallas 297, the Chief Justice again applied in person the doctrine and a conviction was actually had on the same erroneous indictment and instruction.

This view of the Chief Justice was shared by his contemporaries, and as an original proposition has much to commend itself. Chief Justice Ellsworth was of the same opinion and the question has more than an academic interest.

"See the speeches and letters of Parker and Roosevelt accepting their respective nominations for the presidency in 1904. It seems curious that in the renewal of an old controversy more use was not made of Ellsworth's charge in the case of Williams, or of the contrary view set forth in United States *v.* Hudson and still more clearly in Wheaton *v.* Peters (1834) 8 Peters 591. The court's opinion in the latter case contains this language —doubtless a correct statement of the law: 'It is clear that there can be no common law of the United States * * * When, therefore, a common law right is asserted, one must look to the State in which the controversy originated.'" Wm. Garrott Brown: Life of Oliver Ellsworth, p. 260, note.

The curious reader will find the subject discussed in detail in an elaborate note to the case of Gideon Henfield (1793) as reported in Francis Wharton's State Trials, pp. 49, 85–89.

[2] (1792) 2 Dallas 402; (1794) 3 Dallas 1.

[3] See Flanders' account of the case in his Lives of the Chief Justices, Vol. I, pp. 392–393.

visions of the treaty of peace, as the law of the land, vested in Brailsford the rights which he might otherwise have lost by the act of confiscation.

This decision is sound and in accordance with all subsequent cases on the subject.[1]

But by far the most famous and important case in Jay's time was Chisholm, Exr., *v.* Georgia,[2] in which the Chief Justice held that a State of the Union was suable in the Supreme Court at the instance of a private suitor of a sister State.[3]

From this judgment Mr. Justice Iredell dissented, and time as well as the XIth Amendment to the Constitution sustains the dissent. The reasoning of the case is, however, unanswerable, although the amendment forbade suit at the instance of a private citizen. For say what we will, the States are not sovereign in an unlimited sense, and when we admit this, the result is something less than sovereignty.[4] The nation is supreme, as was shown in 1861, and if the nation is supreme the individual States composing the nation cannot be.

The famous decision of McCulloch *v.* Maryland[5] is largely a restatement of Jay's opinion, and it is on the opinion of Chisholm *v.* Georgia that Jay's claim to greatness as a judge must rest. It gave him an opportunity to consider a fundamental question of constitutional law, and he considered it broadly, from the standpoint of statesman as well as judge. And it seems to the writer that Jay stood the test, and that this one careful opinion, notwithstanding

[1] Hamilton *v.* Eaton (1890) 2 Martin's N. C. Reports 83, per Ellsworth, C. J.; Ware *v.* Hylton (1796) 3 Dallas 199.

[2] (1793) 2 Dallas 419.

[3] The opinion of the Chief Justice is also printed in full in Correspondence and Public Papers, Vol. III, pp. 453-471.

[4] The writer is not unaware that The Federalist (No. 81) denied that a State of the Union was suable at the instance of a private suitor. The fact that a State is suable by another State in the Supreme Court does away with the idea of sovereignty although it preserves equality of States within the Union.

The fact that a State might be sued against its sovereign will deprived it of a sovereign privilege to that extent. The fact that a State as the trustee of its citizens might sue is decisive; for if the State may be sued at all, suit by State or private citizen is reduced to the question of the proper party to institute the suit. If the right of action exists, the person of the actor is a minor point.

[5] (1819) 4 Wheat. 316.

the press and stress of business and hasty composition, placed Jay in the category of great judges. Constitutional amendments are not usually required to check inferior minds or patent error.

The clean-cut language of Judge Cooley, no mean authority in matters of constitutional law, should be borne in mind by those who question Jay's ability as a judge.

"After this clear and authoritative declaration of national supremacy," said Judge Cooley, "the power of a court to summon a State before it, at the suit of an individual, might be taken away by the amendment of the Constitution—as was in fact done—without impairing the general symmetry of the Federal structure, or inflicting upon it any irremediable injury. * * * The Union could scarcely have had a valuable existence had it been judicially determined that powers of sovereignty were exclusively in the States or in the people of the States severally. * * * The doctrine of an indissoluble Union, though not in terms declared, is nevertheless in its elements at least contained in the decision. The qualified sovereignty, national and State, the subordination of State to nation, the position of the citizen as at once a necessary component part of the federal and of the State system, are all exhibited. It must logically follow that a nation, as a sovereignty, is possessed of all those powers of independent action and self-protection which the successors of Jay subsequently demonstrated were by implication conferred upon it."[1]

The decision was not merely a promise; it was a demonstration of great power. What years of experience on the bench would have produced it is futile to say; but the country is to be congratulated that when Jay laid aside the ermine he was, after a few years of interregnum, succeeded by Marshall, whose judgments, it may be said, following the lines of Chisholm *v.* Georgia, created a nation from scattered and discordant States.

It has been remarked that Jay began the study of law by a careful study of Grotius, and that his mastery of international law is evident throughout his whole career. The late W. E. Hall was no lover of America, but he assigns to the United States the credit of declaring and establishing the modern doctrine of neutrality. Washington's Proclamation of Neutrality is classic, and the hand that drew it was Jay's.[2] In a letter to Hamilton, dated April

[1] Constitutional History of the United States, as seen in the Development of American Law, 1889, p. 49. Quoted in Pellew's Life of Jay, pp. 254–255.

[2] Correspondence and Public Papers, Vol. IV, pp. 474–477.

11, 1793, Jay enclosed a draft of a proclamation, and on the 22d of the month Washington issued the epoch-making proclamation in a more general and condensed form.[1]

The elaborate charge to the grand jury at Richmond, Virginia, May 22, 1793, expounded at length and correctly the doctrine and duties of neutrality,[2] as this government has subsequently held and included in the treaty of Washington.

The fact that the violation of the law of nations was held, as part of the law of the land, indictable according to the forms of the common law in the absence of a statutory penalty, does not invalidate the correctness of the law as laid down. The charge was properly regarded as a great effort, and its publication in pamphlet form did much to prevent the violation of the law of nations as correctly understood and expounded.

And in the case of Glass *v.* The Sloop Betsey,[3] the Chief Justice, in delivering a unanimous opinion, correctly held that:

"No foreign power can of right institute, or erect, any court of judicature of any kind within the jurisdiction of the United States, but such only as may be * * * in pursuance of treaties. It is therefore decreed and adjudged that the admiralty jurisdiction, which has been exercised in the United States by the consuls of France, not being so warranted, is not of right."

It would be an oversight to pass unnoticed the fact that Jay performed a genuine service to the country in bottoming the rules of the practice of the Court upon English common law and chancery. Nor should his solicitude for the regulation of Admiralty in the matter of prizes be overlooked. When in England in 1794, he requested the opinion of Sir William Scott on this subject. To quote his language:

"It appeared to me advisable that our people should have precise and plain instructions relative to the prosecution of appeals and claims, in cases of capture. For that purpose I applied to Sir William Scott, and requested him, in concert with Dr. Nicholl, to prepare them. We conversed on the subject, and I explained to him my views and objects."

[1] Richardson's Messages and Papers of the Presidents, Vol. I, pp. 156–167.

[2] Correspondence and Public Papers, Vol. IV, pp. 478–485.

[3] (1794) 3 Dallas 6.

The letter from Lord Stowell (then Sir William Scott, and later the glory of the Admiralty bench), has been the basis of our law and practice on the subject.[1]

Another matter should be noticed before leaving Jay's services as a Judge, for in the two matters to be referred to, the principle of the separation of the court from the legislative and executive branches of the government was settled.

First as to the independence of the legislature:

"In April (1791) the Circuit Court for the District of New York, with Jay presiding, agreed unanimously to a protest against an act of Congress providing that applications for invalid pensions should be passed on by the judges of the Supreme Court in their respective circuits. The protest declared that Congress could not assign to the judiciary 'any duties but such as are properly judicial, and to be performed in a judicial manner. That the duties assigned to the Circuit Courts by this act are not of that description * * * inasmuch as it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the secretary of war, and then to the revision of the legislature; whereas, by the constitution, neither the secretary of war, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.' Accordingly when the question came before the court on a motion for a mandamus in Hayburn's case, before a decision was given, the obnoxious act was repealed. Practically the court had declared for the first time an act of Congress unconstitutional."[2]

Finally as to the independence of the Executive:

"We have considered the previous question stated in a letter written by your direction to us by the Secretary of State on the 18th of last month (regarding) the lines of separation drawn by the Constitution between the three departments of the Government. These being in certain respects checks upon each other, and one being judges of the court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *Executive* department.

We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflection that your judgment will discern what is right, and that your usual prudence, decision, and firmness will surmount every obstacle to the preservation of the rights, peace, and dignity of the United States."

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[1] See Wheaton, the Law of Maritime Capture, Appendix pp. 309–340.

[2] Pellew's Life of Jay, p. 240.

It would therefore appear that short as was Jay's service on the bench, his Chief Justiceship was nevertheless of great importance, and that he fully justified the appointment.

By the year 1794 the situation with Great Britain had become so critical and strained that war seemed the natural and far from impossible result.

Our country was drunk with a frenzy for France and although Washington was able to prevent direct violations of neutrality, he was unable to restrain the license of the press and the mistaken but genuine outbursts of sympathy for France and its Revolution. "Citizen" Jefferson and his party saw the road to office and preferment loom up before them, if only the democracy could speak the word, and in a few years the democracy found both voice and vote.

Great Britain was never particularly proud of the peace of 1783, and while it generally observed the letter, other than in the retention of the frontier posts, the spirit of the treaty was absolutely disregarded. The commercial policy of Great Britain was as ruinous to the United States as it was insupportable.

The wild enthusiasm for things French and consequent disapproval of Great Britain and its policy exercised a far from soothing effect, and the two nations were slowly but surely drifting into a state of feeling that always forbodes war.

"Peace", said Washington, "ought to be pursued with unremitting zeal before the last resource, which has often been the scourge of nations and cannot fail to check the advancing prosperity of the United States, is contemplated."[1]

To avert this misfortune, perhaps catastrophe, John Jay was selected for the difficult task of special envoy to Great Britain. The Chief Justice was under no delusion as to the effect of the mission upon his popularity; for peace could only be bought by concession, and concession of any kind, given the temper of the country, meant a sacrifice of popularity.

[1] Writings of Washington, X, 404.

"The learned Dr. Carnahan, who became President of Princeton College in 1823, in his lectures on moral philosophy used to quote a conversation between Jay and some friends at this time that was told him by an ear-witness, as a striking instance of courageous patriotism. 'Before the appointment was made, the subject was spoken of in the presence of Jay, and Jay remarked that such were the prejudices of the American people, that no man could form a treaty with Great Britain, however advantageous it might be to the country, who would not by his agency render himself so unpopular and odious as to blast all hope of political preferment. It was suggested to Mr. Jay that he was the person to whom this odious office was likely to be offered. "Well," replied Mr. Jay, "if Washington shall think fit to call me to perform this service, I will go and perform it to the best of my abilities, foreseeing as I do the consequences to my personal popularity. The good of my country I believe demands the sacrifice, and I am ready to make it." ' In a similar spirit he wrote to his wife April 15: 'The object is so interesting to our country, and the combination of circumstances such, that I find myself in a dilemma between personal and public considerations.' And again: 'Nothing can be more distant from every wish on my own account * * * This is not of my seeking; on the contrary, I regard it as a measure not to be desired, but to be submitted to.' His acceptance he explained a few days later: 'No appointment ever operated more unpleasantly upon me; but the public considerations which were urged, and the manner in which it was pressed, strongly impressed me with a conviction that to refuse it would be to desert my duty for the sake of my ease and domestic concerns and comforts.' "[1]

The situation was difficult, for Great Britain retained the western ports; the boundaries of the west and north coast were unsettled and Great Britain had made no compensation for the negroes carried away. On the other hand, our country had not treated British merchants fairly in the matter of debts contracted before the Revolution.

Then too, Great Britain claimed that France had fitted out privateers with which to injure British commerce, and America claimed damages for unlawful captures by British cruisers.

Jay landed in England on June 8th, 1794, and on November 19th of the same year the treaty was signed.

The treaty as a whole was admirable and Jay deserved hardly less honor for the treaty of 1794 than for the treaty of 1783. In a way the later treaty was the greater achievement, for the treaty of 1783 merely put an end to a war that was practically non-existent; whereas, the treaty of

[1] Pellew's Life of Jay, pp. 267–268.

1794 prevented the outbreak of a war that threatened daily.

The commercial clauses were and since have been severely criticized, but it must be remembered that this country had then no treaty of commerce with Great Britain, and that the concessions, however inadequate, were still concessions and therefore advantageous. It should also be borne in mind that the opposition to the treaty in Great Britain was hardly less marked, owing to a mistaken belief that a surrender was made without any adequate return.

But to pass to another aspect of the case, the judicial mind of John Jay was seen in his handling of the claims of the citizens of the respective countries. The question of fact is always the one great difficulty; the application of the principle of law to the facts when found is comparatively simple. To settle rightly and thus permanently, the treaty provided in Article VI for the appointment of a Board of five Commissioners to meet at Philadelphia to ascertain the facts, and a Board of five Commissioners at London to assess the damages, in the absence of adequate remedy at law, "according to the merits of the several cases, and to justice, equity, and the law of nations." [1]

Under this clause American citizens received an award of $10,345,000.

Mr. Pellew comments on the Treaty as follows: [2]

"To unprejudiced eyes after the lapse of a hundred years, considering the mutual exasperation of the two peoples, the pride of England in her successes in the war with France, the weakness and division of the United States, the treaty seems a very fair one. Certainly one far less favorable to America would have been infinitely preferable to a war, and would probably in the course of time have been accepted as being so. The commercial advantages were not very considerable, but they at least served as 'an entering wedge,' to quote Jay's expression, and they were *pro tanto* a clear gain to America. Some such thoughts may have been in Lord Sheffield's mind when, at the breaking out of the war of 1812, he remarked: 'We have now a complete opportunity of getting rid of that most impolitic treaty of 1794, when Lord Grenville was so perfectly duped by Jay.' And it is significantly admitted by the latest biographer of the Democratic hero, Andrew Jackson, that 'Jay's treaty was a masterpiece of diplomacy, considering the time and the circumstances of this country.'

[1] Pellew's Life of John Jay, pp. 274–280.

[2] See Moore's International Arbitrations, Vol. I, Ch. IX.

"The truth of the whole matter was probably expressed as well as ever by Lord Grenville to Jay, in 1796: 'It is a great satisfaction to me when, in the course of so many unpleasant discussions as a public man must necessarily be engaged in, he is able to look back upon any of them with as much pleasure as I derived from that which procured me the advantage of friendship and intercourse with a man valuable on every account. * * * I, on my part, should have thought that I very ill consulted the interests of my country, if I had been desirous of terminating the points in discussion between us on any other footing than that of mutual justice and reciprocal advantage; nor do I conceive that any just objection can be stated to the great work which we jointly accomplished, except on the part of those who believe the interests of Great Britain and the United States to be in contradiction with each other, or who wish to make them so.'"

Perhaps the following two quotations from the same authority sum up at once the view of the country on the one hand, and Jay's own opinion endorsed as it is by posterity.

"James Savage, once president of the Massachusetts Historical Society, told his grandson that he remembered seeing these words chalked in large white letters around the inclosure of Mr. Robert Treat Paine:—

'Damn John Jay! Damn every one that won't damn John Jay!! Damn every one that won't put lights in his windows and sit up all night damning John Jay!!!'"[1]

"Throughout the storm of vituperation Jay himself remained calm and philosophical. 'As to my negotiation and the treaty,' he wrote to Judge Cushing, 'I left this country well convinced that it would not receive Anti-Federal approbation; besides, I had read the history of Greece, and was apprised of the politics and proceedings of more recent date.' 'Calumny,' he said again, 'is seldom durable, it will in time yield to truth.' He had at least done his duty, though by so doing he very possibly lost the presidency of the United States."[2]

Then, as always, the pious ejaculation of Fisher Ames commends itself to the thoughtful: "Lord, send us peace in our day, that the passions of Europe may not inflame the sense of America."

As on his previous return from Europe he found a new office awaiting him, for during this absence he was elected Governor of New York. This was not the first time he was elected, for in 1792 he had been counted out in a way that indicates that even the present cannot be much worse than the past.

The immediate result of the acceptance of the Governorship was the resignation from the Bench, and although the

[1] Pellew's Life of John Jay, p. 282. [2] Id. p. 283.

Chief Justiceship was urged upon Jay upon the retirement of Ellsworth he never again exercised the duties of the position.

"'I had no permission from you,' said President Adams, 'to take this step, but it appeared to me that Providence had thrown in my way an opportunity, not only of marking to the public the spot where, in my opinion, the greatest mass of worth remained collected in one individual, but of furnishing my country with the best security its inhabitants afforded against its increasing dissolution of morals.' 'I left the bench,' Jay replied, 'perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which was essential to its affording due support to the national government; nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess. Hence I am induced to doubt both the propriety and the expediency of my returning to the bench under the present system. * * * Independently of these considerations, the state of my health removes every doubt.'"[1]

Of Jay's six years' tenure of office from 1795–1801, for he was re-elected in 1798, there is little to say. He administered the affairs of state with the same zeal and care that he always displayed in office.

It will not be surprising to learn that Jay refused to act the partisan even in the slightest degree, for although his opponent Clinton had been in office continuously since 1777 until 1795, and notwithstanding all positions were filled by political opponents, Jay neither made a political appointment nor made a single political removal during the entire six years of his Governorship.[2]

The one measure of his administration which must have pleased Jay most was the passage in April, 1799, of an act of emancipation.

The following is Mr. Pellew's account of the act and its provisions:

"It was provided that all children born of slave parents after the ensuing 4th of July should be free, subject to apprenticeship, in the case of males till the age of twenty-eight, in the case of females till the age of twenty-five, and the exportation of slaves was forbidden. By this process of gradual emancipation there was avoided that question of compensation which had been the secret of the failure of earlier bills. At that time the number of slaves was only 22,000, small in proportion to the total popula-

[1] Pellew's Life of John Jay, p. 301. See the correspondence in full, in Correspondence and Public Papers, Vol. IV, 284–286.

[2] Jay's Life of Jay, Vol. I, 392; Flanders' Chief Justices, Vol. I, 416.

tion of nearly a million. So the change was effected peacefully and without excitement. Jay himself was a slaveholder in a certain sense. 'I have three male and three female slaves,' he wrote in a return of his property to the Albany assessors, November 8, 1798; 'five of them are with me in this city, and one of them is in the city of New York. I purchase slaves and manumit them at proper ages, and when their faithful services shall have afforded a reasonable retribution.' Perhaps the governor's practice in this respect may have suggested the practical manner of emancipation."

For fully twenty-three years Jay had contemplated retirement to private life. As President of Congress he wished to withdraw; after the negotiation of the Treaty of Independence he wished to devote himself to the practice of law and his duties as a citizen. But there was always some public reason that prevented him from fulfilling what must be considered his heart's desire. And in the very last year of his Governorship he was besought to remain before the public. His friends urged in vain that he run again for Governor; President Adams laid the Chief Justiceship at his feet but Jay would none of it.[1]

With the Governorship, Jay's public career closed, and he never seems at any subsequent period to have desired place and position. Indeed he never was a candidate in the sense that he forced himself into notice, although he did not hang back and positively refuse in his younger days. There is perhaps no more signal instance in the history of the country of the office seeking the man, and there is assuredly no instance of greater fidelity to the trust imposed. Mistakes of judgment may be pointed out, as in his willingness to yield to Spain in the matter of the navigation of the Mississippi, in a commercial clause or two of the treaty of 1794, and in his deliberate view of the unimportance and comparative failure of the Supreme Court; but it may be confidently asserted that his honesty and disinterestedness are beyond the breath of suspicion, or the possibility of question.

If there is a lack in his public career it is a lack of warmth and a failure of imagination that stamp him as inferior to his younger but greater contemporary, Hamilton. But in the quality of judgment he was certainly his supe-

[1] These letters are very interesting in themselves, but the material portions of them have already been quoted.

rior, and in the fine balancing and weighing of his relations to the public he was strangely like Washington. There is so little of human frailty in either that they must always remain apart; apart from their contemporaries, and apart from the world in which they lived. It is improbable that any venturesome publisher will ever attempt the "true" life of John Jay.

The twenty-eight years of his retirement were devoted solely to his home circle, and the peaceful pursuits of a country gentleman, in which there is little to record. He was a devoted churchman and the president of the American Bible Society. He renewed the acquaintances of his youth and corresponded with old friends. Naturally grave, he became in old age taciturn, and there is little account of conversations with family or friends. He longed for repose and silence, and his retreat in Bedford seems to have supplied both. In a letter to his fellow law student, Lindley Murray, he calls attention to the pleasureableness of his situation.

"Being retired from the fatigues and constraints of public life, I enjoy with real satisfaction the freedom and leisure which has at length fallen to my lot. For a long course of years I had been looking forward with desire to the tranquil retirement in which I now live, and my expectations from it have not been disappointed. I flatter myself that this is the inn at which I am to stop in my journey through life. How long I shall be detained is uncertain, but I rejoice in the prospect of the probability of being permitted to pass my remaining time in a situation so agreeable to me. Do not conclude from this that I am without cares and anxieties exclusive of those which are more or less common to all men. The truth is, that although in numerous respects I have abundant reason to be thankful, yet in others I experience the necessity and the value of patience and resignation."

There is perhaps no finer exhibition of the resignation spoken of in this letter than in his conduct on learning of the fraudulent practices by which he was cheated out of the Governorship. "My robe may become useless, or it may not. I am resigned to either event. He who governs all makes no mistakes, and a firm belief of this would save us from many." And in a letter to Rufus King he says: "The reflection that the majority of electors were for me is a pleasing one; that injustice has taken place does not surprise me, and I hope will not affect you very sensibly.

The intelligence found me perfectly prepared for it. * * * A few years will put us all in the dust, and it will then be of more importance to me to have governed myself, than to have governed the State."[1]

The event which he had constantly in mind and to which he looked forward with a fond and chastened pleasure, took place on May 14th, 1829.

JAMES BROWN SCOTT.

WASHINGTON, D. C.

[1] Jay's Jay, Vol. I, 289.